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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application of Rocky Mountain Power for Approval of Solicitation Process for Wind Resources	Docket No. 17-035-23

PETITION OF UTAH ASSOCIATION OF ENERGY USERS FOR RECONSIDERATION AND REHEARING OF COMMISSION ORDER ISSUED SEPTEMBER 22, 2017

Pursuant to Utah Code sections 54-7-15 and 63G-4-302, and Rule R746-1-801 of the Utah Administrative Code, the Utah Association of Energy Users ("UAE") hereby submits this Petition for Reconsideration and Rehearing of the Public Service Commission of Utah's ("Commission") September 22, 2017 Order Approving RFP With Suggested Modification ("Order") with respect to Rocky Mountain Power's ("RMP") application for approval of solicitation process for wind resources ("Application"). UAE respectfully requests that the Commission reconsider, and/or grant rehearing of, its Order to remedy each of the legal errors discussed herein.

1. The Order Fails to Address or Apply Factors Required by Statute and Rule.

The Order fails to address or apply several factors required by statute and Commission rules. The Energy Resource Procurement Act ("Act"),[1] which governs both the Application and the Order, requires that, before RMP may "acquire or construct a significant energy resource," it must first "conduct a solicitation process that is approved by the commission."[2] Section 54-17-201(2)(c)(ii) of the Act sets forth several factors that the Commission must consider when making its determination whether the proposed solicitation process is in the public interest. In addition, Commission rule R746-420-3 ("Rule") sets forth additional requirements for a solicitation process. As discussed below, the Order fails to adequately address or apply many of the mandatory factors specified by the Act and the Rule.

Utah Code § 57-17-201(2)(c)(ii) requires that the Commission "***shall*** determine" whether a proposed solicitation process:

> (ii) is in the public interest taking into consideration:
> (A) whether it will most likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost to the retail customers of an affected electrical utility located in this state;
> (B) long-term and short-term impacts;
> (C) risk;
> (D) reliability;
> (E) financial impacts on the affected electrical utility; and
> (F) other factors determined by the commission to be relevant.[3]

The Order never makes the critical finding that the approved solicitation process is in the public interest. While the Order contains a section titled "Whether the Solicitation Process is in

[1] Utah Code §§ 54-17-101 to -806.
[2] *Id*. § 54-17-201(2)(a).
[3] *Id*. § 54-17-201(2)(c) (emphasis added).

the Public Interest,"[4] it does not purport to find or determine that the solicitation process is, in fact, in the public interest—a fatal flaw.[5] UAE respectfully submits that, not only does the Order not find that the solicitation process is in the public interest as required, but as discussed below, it could not properly do so, based on an inadequate record and the failure of RMP to meet its burden of proof.

The Order also fails to address or apply the public interest factors specified in Utah Code § 54-17-201(2)(c)(ii). The Order lists these factors,[6] but does not then purport to discuss or apply them to a public interest determination. The Order does include several pages of discussion about whether solar bids should also be solicited and evaluated on a comparable basis and whether delays associated with accepting solar bids might affect the availability of Production Tax Credits ("PTCs").[7] The Order also discusses the statutory requirement that the solicitation process must "most likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost to the retail customers of [PacifiCorp] located in [Utah]"[8] (the "Low-Cost Standard"). However, the Order does not find that, or explain how, this critical Low-Cost

[4] *See* Order at 7-12.
[5] *See Utah Dep't of Bus. Reg., Div. of Pub. Utilities v. Pub. Serv. Commn.*, 614 P.2d 1242, 1246 (Utah 1980) (reversing Commission order granting application to increase rates based on utility's increased expenses without examining other factors, in which Court noted that "[o]ne of the most significant deficiencies in the order was the omission of any finding the new rates were just and reasonable."). In contrast, the Dissent of Commissioner Clark specifically concludes that the proposed solicitation is not in the public interest without a concurrent solicitation of solar resources. *See* Commission Order at 14 (Comm'r Clark, dissenting).
[6] *See* Order at 5.
[7] *See* Order at 7-11.
[8] Utah Code § 54-17-201(2)(c)(ii)(A).

Standard has been satisfied. Moreover, the Order fails to even address any of the other factors cited in Utah Code § 54-17-201(2)(c)(ii).[9]

The Order also fails to address or apply factors required by the Rule. For example, the Rule requires that a proposed solicitation process must:

> (iv) Be designed to solicit a robust set of bids to the extent practicable; and
>
> (v) Be commenced sufficiently in advance of the time of the projected resource need to permit and facilitate compliance with the Act and the Commission rules and a reasonable evaluation of resource options that can be available to fill the projected need and that will satisfy the criteria contained within Section 54-17-302(3)(c). . . . .

The Order does not purport to address these requirements or find that or explain how they have been satisfied. Indeed, while the Order notes that RMP agreed to expand its RFP to include additional wind resources,[10] it fails to discuss whether or explain how this limited expansion is sufficient "to solicit a robust set of bids" (the "Robust RFP Requirement").

Moreover, while the Order discusses PTC timing concerns,[11] it does not find that RMP initiated the solicitation process "sufficiently in advance of the time of the projected resource need to permit and facilitate compliance with the Act and the Commission rules" (the "Timeliness Requirement") or "a reasonable evaluation of resource options that can be available to fill the projected need and that will satisfy the criteria contained within Section 54-17-302(3)(c)" (the "Resource Option Requirement") as required by the Rule. To the contrary,

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[9] *See Utah Dep't of Bus. Reg., Div. of Pub. Util. v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1246 (Utah 1980) (reversing Commission order granting application to increase rates without examining multitude of factors that affect rates).
[10] Order at 7.
[11] *Id*. at 10-11.

RMP's failure to satisfy the Timeliness Requirement clearly affected the Commission's decision to approve the RFP with only a suggested, rather than a required, modification.

The Order expresses concern that requiring acceptance of solar bids might cause a delay of several months,[12] which might affect PTCs,[13] and then cites uncertainty as to the effect of such a delay *in support* of the decision "to suggest a modification to include solar resources in the RFP, rather than to reject the RFP until that modification is made."[14] Wholly lost in the Commission's discussion of this issue is any examination of or finding that RMP satisfied the Timeliness Requirement in a manner designed to satisfy the Resource Option Requirement necessary to permit a reasonable evaluation of available resource options.[15] If there is insufficient time to include in the RFP available and potentially competitive resource options, it is the fault of RMP for failing to begin the process sooner, or at least to propose an RFP that satisfies the Robust RFP Requirement. RMP's choice to delay filing for approval of a solicitation process and to propose an RFP that severely limits available and potentially competitive resource bids cannot support a finding that the process satisfies the Rule. Deliberate and selfish choices by RMP do not support the imposition of unnecessary costs or risks on Utah ratepayers.

2. The Order Will Not Permit Meaningful or Effective Review of any Resulting Resource Decisions.

[12] *Id*. at 11 ("PacifiCorp provided testimony indicating a reasonable but non-firm estimate of several months' delay if the RFP were to be modified to include solar resources that are able to interconnect at any point in the PacifiCorp system.").
[13] *Id*. ("We find inconclusive the evidence related to the effect a delay in the issuance of the proposed RFP might have on the production tax credits.").
[14] *Id*.
[15] R746-420-3(1)(b)(v).

The Order approves RMP's proposed RFP, as amended to include additional wind resources, and strongly suggests,[16] but does not require,[17] that RMP modify its RFP to also accept solar bids, warning that if it fails to do so, RMP must justify that failure when it seeks approval of any resulting resource decisions.[18] In reaching this determination, however, the Commission necessarily assumes that it will be in a position to reasonably evaluate resource decisions sufficient to satisfy the requirements of the Act and the Rule. It will not. Indeed, other findings within the Order itself confirm that the RFP as proposed cannot and will not solicit a sufficiently diverse and robust set of bids to satisfy the critical Low-Cost Standard.

The solicitation process—and the Commission's evaluation of that process—must necessarily allow compliance with all statutory and regulatory requirements. Any resource decisions made by RMP as a result of the RFP must be approved, disapproved, or approved with conditions.[19] In evaluating RMP's resource decisions, the Commission must evaluate the very same factors required to be considered in approving the solicitation process.[20] Thus, if the RFP is found sufficient to satisfy all applicable statutory and regulatory requirements for approval of the RFP—including the Low-Cost Standard—it is not clear if or how the Commission can later find that those same factors are not satisfied when evaluating the results of the approved RFP.

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[16] *See* Order at 9 ("We are recommending that the RFP be modified to include solar resources that can interconnect at any point in the PacifiCorp system . . . .").
[17] *See id*. at 8 (noting "a key distinction between rejecting the RFP . . . and making a suggested modification . . . .").
[18] *See, e.g.*, *id*. at 9 ("If PacifiCorp chooses not to accept the suggested modification, it will have to defend that decision in future dockets, including Docket No. 17-035-40 . . . ."); *id*. at 11 ("PacifiCorp may choose whether to accept our suggested modification and should be prepared to defend that decision in future dockets including Docket No. 17-035-40.").
[19] *See* Utah Code § 54-17-302(5).
[20] *See* Utah Code § 54-17-302(3)(c) (listing same "public interest" factors set forth in Utah Code § 54-17-201(2)(c)(2)).

Moreover, by not requiring RMP to accept solar bids, the Commission has deprived itself and RMP ratepayers of the only meaningful and adequate method of determining whether any resulting resource decisions should be approved as consistent with the Act. The Commission properly rejected RMP's proposal for a separate solar RFP, noting that "a second and separate RFP for solar resources, based on modeling inputs that would assume the construction of the proposed wind resource, would not accomplish the objective of comparing the proposed solar resources against the wind resources on an equal basis."[21] The Commission also properly found that "without the benefit of conclusive evidence regarding the current and actual costs to build and connect utility scale solar projects to the PacifiCorp system, . . . the market would provide the best comparative results."[22] Unfortunately, the Order then fails to properly apply these findings by requiring an RFP that will satisfy the Robust RFP Requirement and the Resource Option Requirement, each of which is critical to a proper application of the Low-Cost Standard. As approved, the RFP simply will not provide the information necessary for a reasoned and comparative review of all mandatory public interest factors.

3. The Order Relies Upon an Inappropriate Laissez-Faire Approach Towards Regulation of Monopoly Utilities, Particularly under the Act.

UAE acknowledges the Commission's reluctance to be "making the business decisions of PacifiCorp."[23] However, UAE respectfully submits that the Commission has statutory obligations to actively protect ratepayers from the consequences of improper or selfish actions of

[21] Order at 9.
[22] *Id*.
[23] *Id*. *See also id*. at 5 ("[W]e, as regulators, should not substitute our judgment on business management decisions for that of a regulated utility that has the ultimate responsibility to plan and provide for adequate electric service to its customers at a reasonable price.").

monopoly utilities that may cause higher risks and rates.[24] In addition, the Act and the Rule impose specific obligations that are inconsistent with the manner in which the Commission's reluctance to second guess RMP management is applied in the Order.

Approval of the RFP, coupled with subsequent approval of any resulting resource decisions, largely *preclude later prudence review* of those decisions.[25] Therefore, the Commission is statutorily tasked with the obligation to ensure, up front, that the solicitation and evaluation processes are sufficiently fair and robust to protect ratepayer interests. UAE respectfully submits that the Commission's proper role under the Act should not be seen as either that of a referee or a coach, but rather as a judge ensuring compliance with all requirements and protecting captive ratepayers.[26]

Among other things, the Commission has an affirmative obligation to hold RMP to its burden of proof to demonstrate that its procurement processes—and any resulting resource decisions—are fair and robust, adequate to satisfy all applicable statutory and regulatory requirements, and in the public interest. While "some deference" to RMP management may be appropriate, it is not appropriate for the Commission to "defer to bald assertions by management . . .. *particularly when more compelling evidence*, in the form of economic and statistical

[24] *E.g.*, Utah Code §§ 54-3-1-3, 54-3-7-8, 54-3-23, 54-4-2.
[25] Utah Code §§ 54-17-303, 54-17-403.
[26] UAE acknowledges a certain passion over proper interpretation and enforcement of the Act. As briefly explained in UAE's initial comments in this docket, UAE was an active proponent of the Act and the Rules in an effort to ensure competitive solicitations and thus low-cost resources for Utah ratepayers. RMP has historically shown remarkable consistency in selecting its own benchmark resources. The Act and Rules were intentionally designed to ensure that a broad array of competitive bids will be received and fairly analyzed *specifically because* RMP management (quite naturally) prefers owning baseload resources rather than purchasing power generated by others. Undue deference to RMP management on such issues thus flies directly in the face of the Act and UAE's goals in supporting adoption of the Act and the Rules.

analyses *and comparisons* of the type which can be committed to record and be available for analysis by the commission and by a reviewing court, can be developed at a reasonable cost . . . ."[27] By not requiring RMP to solicit and evaluate competing solar bids, the Order effectively denies RMP ratepayers of the opportunity for meaningful review and evaluation of necessary and "compelling" resource comparisons that could be developed "within a reasonable time and at reasonable cost." UAE respectfully submits that properly application of the findings and logic of the Order require that RMP must solicit and evaluate solar and wind bids on a fair and comparable basis.

4. The Order Fails to Hold RMP to its Burden of Proof and Improperly Shifts the Burden to, and Imposes Impossible and Inappropriate Burdens on, the Intervenors.

As with its obligation to demonstrate prudence of all actions that affect rates paid by captive ratepayers,[28] RMP has the burden of proving compliance with all requirements of the Act and the Rule. Therefore, RMP has the burden to prove, among other things, that the projected 2015-2016 era solar prices for 2020 resources that it relied upon in excluding solar bids are still sufficiently accurate in late 2017 to justify ignoring the Robust RFP Requirement and the

[27] *See Utah Dep't of Bus. Reg., Div. of Pub. Util.*, 614 P.2d at 1247 (quoting *State v. Jager*, 537 P.2d 1100, 1113-14 (Alaska 1975) (emphasis added).

[28] *See, e.g., id*. at 1245 ("In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates is just and reasonable."). *See also Comm. of Consumer Svcs. v. Pub. Serv. Comm'n*, 75 P.3d 481, 486-87 (Utah 2003) (reversing Commission ruling that "fails to hold Questar Gas to its burden of proof" because "the Commission abdicated its responsibility to find the necessary substantial evidence in support of the proposed rate increase in the record. We are far from certain, moreover, that the Commission could conceivably determine whether a rate increase is just and reasonable, without examining whether the underlying cost-incurring activity was reasonable, which in turns seems to require some attention to the utility's decisionmaking process . . . .")

Resource Option Requirement, which in turn are necessary to satisfy the critical Low-Cost Standard and to support a defensible public interest finding. Similarly, RMP has the burden to prove its claim that delays stemming from satisfying the requirements of the Rule would in fact place PTC qualification in jeopardy. RMP wholly failed to meet its burden of proof on any such issues. Indeed, the Order expressly finds that the evidence on these issues is "inconclusive."[29] Thus, findings within the Order itself confirm that PacifiCorp failed to carry its burden of proof. However, rather than holding RMP to its burden, the Order improperly shifts the burden to, and imposes impossible and inappropriate burdens on, intervenors.

For example, rather than requiring RMP to prove that its assumed solar prices remain reasonably representative of expected 2020 solar prices, the Order effectively shifts the burden to intervenors to prove conclusively that currently-operating solar projects—which were necessarily priced and constructed well before 2017—reflect similar prices as projects to be constructed over the next several years so as to be in service by 2020.[30] This improper burden was imposed on intervenors despite the fact that the evidence from several parties clearly shows significant *recent* reductions in solar prices, that 2020 projects are *currently* being priced in the $30 range, and that power purchase agreements for 2020 resources have *recently* been signed and will be constructed in that same price range.[31] Given such evidence, there is obviously no way that intervenors could have met the impossible burden to show that projects that are already operating—which necessarily began construction some time ago, before the recent price declines—were completed in that lower price range.

[29] Order at 8, 10.
[30] *Id.* at 8-9
[31] *See, e.g.*, *id.* at 7-8; Reporter's Transcript Re: September 19, 2017 ("Tr."), at page 252, line 25 – page 265, line 25; page 268, line 17 – page 271, line 5.

Similarly, rather than holding RMP to its burden to demonstrate that PTCs would in fact be seriously jeopardized by the slight delay that might be required to satisfy the Robust RFP Requirement, the Timeliness Requirement and the Resource Option Requirement, the Order shifts the burden to intervenors to prove "conclusively" through tax experts that any such delay would not disqualify PTC qualification.[32] Again, the import of an evidentiary failure by RMP on a critical aspect of its case was imposed on intervenors—and potentially on captive ratepayers—instead of on the utility with the burden of proof. Beyond this erroneous shift in burden of proof, this requirement is particularly inappropriate in the context of this case, given severe testimony timing constraints imposed on intervenors as a result of RMP's failure to satisfy the Timeliness Requirement, and also because expert testimony is unnecessary given that the plain language of the relevant IRS Bulletin clearly states that production delays resulting from interconnection and transmission delays will not disqualify a wind project's PTCs[33]—a conclusion largely conceded by RMP at hearing.[34]

5. The Order Fails to Recognize that the Record Remains Insufficient to Support RFP Approval, as was Recognized in a Previous Ruling.

Initially, the Commission recognized that the record was insufficient to allow it to make critical statutory findings for approval of an RFP.[35] RMP failed, however, to add anything of substance to this insufficient record. Rather, RMP simply restated and re-hashed the same evidence and arguments that led the Commission to find that the record is inadequate. The record was never supplemented sufficiently to permit proper determinations of the public interest

[32] *Id.* at 10.
[33] *See, e.g.*, i*d.* at 15 (Comm'r Clark, dissenting).
[34] *See, e.g.*, i*d.* at 15 (Comm'r Clark, dissenting).
[35] *See, e.g.*, Tr., page 95, line 23 – page 101, line 4; page 145, line 2 – page 146, line 8.

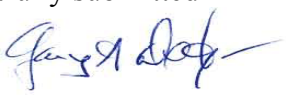
requirements of the Act and the Rule. Indeed, as the Order itself finds, the evidence was inconclusive on two critical issues—solar pricing and PTC qualification. However, rather than properly visiting that failure in evidence and burden of proof on RMP, the Order reverts to laissez-faire deference to RMP management to approve a deficient RFP.[36] UAE respectfully submits that the same inadequate record that caused the Commission initially to reject approval of the RFP and that failed to support critical finds as to solar pricing and PTC timing remains inadequate to support the public interest findings necessary to approve an RFP or any resulting resource decisions.

CONCLUSION

For the foregoing reasons, UAE respectfully asks the Commission to grant reconsideration or rehearing and to modify its Order to require RMP to include solar resources in its RFP in order to secure a robust set of competing bids.

DATED this 23rd day of October 2017.

Respectfully submitted



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[36] *Id.* at 10.

Certificate of Service
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